No. 4023

In the United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH FREDERICKS and CLARENCE CHAMBERS,
Plaintiffs in Error,

—vs.—

THE UNITED STATES OF AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. JEREMIAH NETERER, *Judge*

BRIEF OF DEFENDANT IN ERROR

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STATEMENT OF THE CASE

Plaintiffs in Error, Joseph Fredericks and Clarence Chambers, were in the District Court for the Western District of Washington, Northern Division, charged by indictment with (1) violation of Sec. 37 P. C., viz., conspiracy to violate the Act of October 28, 1919 (National Prohibition Act), by the im-

portation, possession and transportation of intoxictaing liquors, the overt acts alleged being that said defendants did, "from a foreign country, to-wit, British Columbia, in the Dominion of Canada, on or about the 4th day of October, 1922 * * * carry and transport in and on a certain gas boat known as the "Dragon" to a place near Stanwood, Washington * * * certain intoxicating liquors, to-wit, 2628 bottles each containing 1/5 of one gallon of a certain liquor known as whiskey, and 92 bottles each containing 1/5 of one gallon of a certain liquor known as gin * * *; (2) importation on the same day of the same quantities of intoxicating liquor from British Columbia, contrary to the National Prohibition Act; (3) possession on the same day at the town of Stanwood, Washington, of the same quantities of intoxicating liquor, contrary to the National Prohibition Act; (4) transportation on the same day at Stanwood, Washington, in the gas boat "Dragon" of the same quantities of intoxicating liquor, contrary to the National Prohibition Act. (Tr. pp. 2-8).

This indictment was presented to the court and filed on October 26, 1922 (Tr. p. 8) and thereafter, on the 1st day of November, 1922, defendants made and filed their joint "Motion to Quash Indictment

and for Return of Property." (Tr. pp. 9-12), on the grounds that the search, seizure and arrest were without warrant in law. This motion was, according to its terms, based on (1) affidavit of defendants theretofore filed in this cause setting up that the sacks containing the liquor were inside the cabin of the boat and invisible to persons outside of the launch; that the arresting officers did not claim to have a search warrant and that they at no time exhibited, read or delivered to defendants a copy of same; that the affidavit for the search warrant was insufficient (Tr. pp. 60-69); (2) certified transcript of the testimony of S. C. Linville, Federal Prohibition Agent, and one of the arresting officers, given before the United States Commissioner at the preliminary hearing in this case on the 10th of October, 1922 (Tr. pp. 70-80), the testimony being in substance that the defendants were apprehended proceeding up the Stillaguamish river toward Stanwood in the "Dragon" on October 4, 1922, late in the afternoon; that the agents showed their badges, announced that they were federal officers, and to stop the boat as they had a search warrant, that the search warrant was *not* exhibited or read to defendants before the seizure, but was left on the boat in the pilot house after defendant Chambers had

been taken to the hospital; that at that time the defendant Fredericks was on board the gas boat.

Thereafter, for the purpose of controverting the defendants' affidavit, the Government filed the affidavits of certain Prohibition Officers and one individual who assisted in the arrest, viz.: Walter M. Justi (Tr. pp. 80-89), S. C. Linville (Tr. pp. 89-90), Wm. J. Griffiths (Tr. pp. 90-91), and Oscar Hanson (Tr. pp. 91-92). Therein the affiant Justi averred that:

> "That as the said gas boat was proceeding up the said channel slowly against the current towards the town of Stanwood, and when it was at a distance of 75 feet or more from this affiant, he saw clearly and plainly piled in the cabin of said boat a large number of gunny-sacks and saw that said boat was heavily loaded with said gunny-sacks; that this affiant saw and observed that the said gunny-sacks were the same kind and dimensions and sewed and tied in the same manner, with two ears at one end, as are used to contain whiskey and intoxicating liquor; that the said sacks were piled up above the ledges of the windows in said cabin; that the outlines of the bottles were visible through the gunny-sacks; that this affiant has seen a large number of such sacks in his experience as Prohibition Agent covering about a year; that this affiant knows from experience the containers and sacks of whiskey

and gin and believed that the sacks which he saw on board the gas boat 'Dragon' were sacks of intoxicating liquor, and that said boat was heavily laden with said liquor; that the cabin window on the right hand side; which was the side of the gas boat next to this affiant and his companions, was left down from the top and that he observed the said sacks of liquor through said windows; that he also observed the said sacks of liquor piled in the cabin through the window of the pilot-house and the partially open door between the said pilot-house and the said cabin; that this affiant observed the said liquor some appreciable time before any of the officers disclosed themselves or ordered the boat to stop, and that this affiant was looking at said boat and the said liquor while the boat traveled at least the distance of 50 feet and that this affiant called the attention of his companions to the said liquor. That before the prow of said boat came abreast of any of the said officers and when it was about twenty feet away from the said officers, all of the said agents arose from behind the dike where they were stationed and observed the said boat and agent S. C. Linville in a very loud and commanding tone of voice stated: 'Stop that boat. We are Federal Prohibition Agents. We have a search-warrant for your boat and you are under arrest. Stick her nose into the bank there.' That all of the said prohibition agents had their badges pinned on the outside of their coats and that said badges were

> of bright polished metal and were plainly visible to the defendants."

The remainder of the affidavits above noted are but substantial reaffirmations of the allegations in Justi's affidavit.

Thereafter there was filed by each of the defendants a supplemental affidavit (Tr. pp. 92-98) which consisted of reaffirmations of the matters contained in defendant's first affidavit and a denial of the matters contained in the Government's controverting affidavits. At the same time defendants filed the affidavits of Geo. R. Myron (Tr. pp., 98-100) Martin N. Leque (Tr. pp. 101-102), and Eric Sederstrom (Tr. pp. 102-103), which supported defendants' statements that the liquor was not visible to one standing off the boat and that no search warrant was exhibited. The joint affidavit of J. W. Reynolds, George J. Ketchum, L. P. Hanson and C. W. Broxaw was thereafter filed by the Government for the purpose of showing that Myron, Leque and Sederstrom were some 720 feet away from the "Dragon" at the time it was seized and not in a position to see whether the liquor was visible to one off the boat or whether the warrant was exhibited or to hear the words which passed between the parties before the arrest. (Tr. p. 103)

At the same time the additional joint affidavit of Walter M. Justi and S. C. Linville, prohibition agents, was filed by the Government controverting the affidavits of Myron, Leque and Sederstrom. Further affidavits filed by the Government, those of E. O. Matterand (Tr. pp. 107-109), L. D. Angevine (Tr. pp. 110-112), William Rouse (Tr. p. 112), and Dr. O. F. Starr (Tr. p. 112), supported the Government's contention that the liquor was plainly visible through the boat windows before she was stopped.

On this record defendants' motion to quash indictment and petition to return property came on for hearing before the District Judge and thereafter on the 7th of December, 1922, the court's decision was filed denying said motions on the ground that no search warrant was needed to effect a seizure under such circumstances and finding that "the defendants' contention that curtains were drawn over the windows of the boat, thus hiding the liquor, is not sustained." (Tr. pp. 113-116).

Thereafter on the 8th day of January, 1923, the several defendants entered their pleas of "not guilty" (Tr. p. 16) and thereafter on the same day defendants interposed their joint demurrer to the indictment herein on the grounds (1) that the

indictment was insufficient in law, (2) that there was an improper joinder of offenses therein, (3) that the indictment was duplicitous, (4) that the indictment was defective for uncertainty. (Tr. pp. 13-15) Thereafter, on the 24th day of January, 1923, the court filed its written decision overriding said demurrer. (Tr. pp. 117-118)

Thereafter, on the 20th day of February, 1923, a jury was duly sworn and empaneled to try this cause. (Tr. p. 17) The testimony adduced by the Government showed: That the defendants had been seen together on the gas boat "Dragon" during the month of September at least four times by E. O. Matterand, a farmer on the South Fork of the Stillaguamish river near Stanwood. (Tr. pp. 138-139) That on the afternoon of Sunday, October 1st, 1922, the "Dragon" was seen to go out of the north channel of the Stillaguamish river, west towards the Sound. (Tr. pp. 121-138) That about one o'clock in the afternoon of October 4th, 1922, the "Dragon" was seen by the Federal agents in Mud Bay in the mouth of the south channel of the Stillaguamish river near Stanwood, Washington. (Tr. p. 121) Her movements were watched until about 4 o'clock P. M., when the boat weighed anchor and proceeded a short distance inside the channel to

Snaggy Point where she tied up. (Tr. p. 121) The agents had by this time taken a position behind a dike on the south fork of the Stillaguamish river at a point where its navigable portions run very close to the bank. (Tr. p. 121) About 5:30 o'clock P. M. the "Dragon" left her mooring and proceeded up the river. When she came opposite the three agents, they rose up on the dike, called out to stop the boat, that they were Federal agents and had a search warrant. No regard was taken of this command but the boat started ahead at greater speed and a shot was fired across her bows to supplement the verbal command. The engine was finally put in neutral and the boat began to drift down stream. All this time the Federal agents could see through the windows the gunny-sacks containing the liquor. The curtains to the cabin were not drawn and were parted in the middle. Sacks full of liquor were also visible through the pilot house door. (Tr. p. 122) The bottoms of the bottles could be distinguished through the burlap sacks and were so visible prior to the time the command to stop was given. (Tr. p. 123) Defendant Chambers, who was acting in the capacity of pilot, darted from the pilot house to the engine room and was wounded in the leg by one of the agents. (Tr. p. 123) The Federal agents had

been informed that the defendants were heavily armed and believed that defendant Chambers had jumped into the cabin for the purpose of securing firearms. (Affidavit of Walter M. Justi, Tr. p. 85) After the shot was fired the defendant Fredericks brought the boat into the bank. The boat was then boarded by Agent Linville who carried a revolver in one hand and the search warrant in the other. (Tr. p. 124) Besides the liquor involved, there were found on the boat two Mauser automatic pistols with stocks so adjusted that they might be converted into short rifles and two rifles. They were all loaded except the 38-55 rifle. (Tr. p. 136) The defendants in their testimony denied all knowledge of the liquor which filled their boat and claimed that they were transporting sacks, the contents of which were unknown to them, as a favor to a stranger, to Stanwood, Washington. (Tr. pp. 145-153) The jury did not believe this testimony and its detail is, therefore, not material to the questions now raised.

At the conclusion of the trial the jury returned a verdict of guilty as charged on Counts I, III, and IV of the indictment. (Tr. p. 20) and thereafter motions for a new trial (Tr. p. 22) and in arrest

of judgment (Tr. p. 31) were interposed and later denied. (Tr. p. 177)

We shall discuss the errors assigned by defendants under the classifications and in the order treated in their brief.

ARGUMENT

I. THE LEGALITY OF THE SEIZURE

We do not deem it necessary to enter into a discussion of the questions raised by Points 1 and 2 under the issue embodying the contention that the District Court erred in overruling defendants' motion to quash the indictment and for return of evidence. These points have to do with the validity of the search warrant and its execution. It may here be stated that plaintiff justifies the instant seizure and arrest not by any search warrant which the Federal agents may have had at that time but by the facts and circumstances under which the seizure took place.

On the record before it, we fail to see how the District Court could have arrived at any other conclusion than that the sacks of liquor were in plain sight before the seizure took place. The affidavits of George R. Myron, Martin N. Leque and Eric Sederstrom to the contrary are not very convincing

evidence in view of the undisputed fact that these affiants were some 720 feet away from the boat at the time it was seized (Tr. p. 103) and that neither of these could observe from their positions the windows on the right hand side of the boat, which was the side on which the agents were standing. (Tr. p. 106) In fact Myron in a later affidavit, contradicts himself and says (Tr. p. 110):

> "That I could tell whether or not the curtains were up on the boat or hear clearly all the conversation between the men on the bank and the boat was impossible due to the distance I was from the scene of action."

As we read the testimony of Agent Linville before the United States Commissioner at the preliminary hearing, we fail to see the claimed corroboration of the defendants' contention. Linville did testify that (Tr. pp. 70, 71):

> "We lay behind the dike until she was directly opposite us and we could see sacks of liquor in the boat through the windows. * * *
>
> Q. The boat had a cabin on it, had it?
>
> A. Yes, a cabin practically the whole length of it, with the exception of a few feet at the bow.
>
> Q. Any curtains on the windows?
>
> A. Yes, at some of them there were curtains.
>
> Q. And at some there were no curtains,

A. At some of them the curtains were pulled aside a little.

Q. All you saw was sacks?

A. Well, from experience with the liquor traffic, why it was very easy to distinguish that it was a sack of liquor, and not potatoes."

The force of counsel's contention, that mere suspicion of having committed a misdemeanor does not authorize arrest without a warrant, is lost when it is considered that one of the crimes of which defendants stand convicted is a felony. There has in recent years, however, sprung up a strong tendency on the part of the courts to uphold arrests without warrants for misdemeanors where the arresting officer has reasonable grounds for believing that the crime is being committed in his presence. This principle is well illustrated in two of Your Honors' own decisions:

Vachine v. U. S., 283 Fed. 35 and
Lambert v. U. S., 282 Fed. 413.

The facts in the latter case were that Federal Prohibition Agents, without any search warrant or warrant of arrest and acting on information received from one Edison and on the fact that defendant's automobile contained a package covered with canvas which afterwards proved to be a nailed up wooden box, together with a quart bottle full of

reddish liquid, arrested defendant and seized the car and its contents. The information furnished by Edison was that theretofore defendant had been seen in a soft drink parlor and that some conversation with reference to the price of liquor and an attempted sale of the same was had between him and the proprietor of the establishment. In that case Your Honors announced that:

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures. Whether such search or seizure is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case. We think the actions of the plaintiff in error in the present case, as disclosed by the testimony of Edison, were of themselves enough to justify the officers in believing that Lambert was at the time actually engaged in the commission of the crime defined and denounced by the National Prohibition Act, and that they were therefore justified in arresting him and in seizing the automobile by means of which he was committing the offense —just as peace officers may lawfully arrest thugs and burglars, when their actions are such as to reasonably lead the officers to believe that they are actually engaged in a criminal act, without giving the criminals time and opportunity to escape while the officers go away to make application for a warrant."

So in the instant case, the knowledge which led

the agents to apply for a search warrant, supplemented by the peculiar actions of the boat, the appearance of her cargo and the attempt to escape, was such as to reasonably lead the officers to believe that defendants were at that time actually engaged in the commission of a crime. We submit that under such circumstances it did not devolve upon the officers to let their quarry escape and make application for a search warrant and that they would have been derelict in their duty had they done so.

The case of *Snyder v. U. S.*, 285 Fed. 1 (4th C.C.A.) may, if necessary, be distinguished on the facts. It is a borderline case and it may be that the bulge and neck of a bottle protruding through defendant's overcoat would not reasonably warrant the inference that defendant was then engaged in the commission of a crime. But the circumstances and facts leading up to the arrest in the instant case were so much more strongly indicative of the commission of a crime that we do not deem the Snyder case authoritative. Nor do we think Your Honors would have decided the same way on the same state of facts. The dissenting opinion in the Snyder case, *supra*, states the law in this respect, as we understand it:

> "When an officer is authorized by statute to arrest for a misdemeanor committed in his presence or on discovering a person committing a misdemeanor, to justify arrest the officer must have personal knowledge acquired at the time through his hearing, sight, or other sense of the present commission of the crime by the accused. But this does not preclude the idea that the requisite knowledge may be based on a practically certain inference drawn by a reasonable mind from the testimony of the senses. An offense is in the view of the officer when his senses afford him knowledge that it is being committed. *Elrod v. Moss* (C.C.A. 4th Circuit) 278 Fed. 130; *Piedmont Hotel Co. v. Henderson*, 9 Ga. App. 672, 72 S.E. 51; *United States v. Borkowski* (D. C.) 268 Fed. 408, 412; 5 C. J. 416; 84 Am. St. Rep. 686, note. Whether the offense was committed in the presence of the officer in this sense is primarily a question for the trial judge, and his finding should not be disturbed on appeal unless it is without support in the evidence."

To the same effect is *McBride v. United States*, 284 Fed. 416 (5th C. C. A.)

Authority for the arrest in this case was conferred by Section 26, Title 2, of the National Prohibition Act, authorizing officers to arrest any person discovered by them to be transporting liquor in any water craft.

The case of *United States v. Myers*, 287 Fed. 260 (D. C.), also relied on by defendants, is also clearly distinguishable on the facts, the only witness heard for the Government there testifying that:

> "While riding in his automobile along one of the public highways leading into the city of Louisville he passed another automobile coming in the same direction. He observed what he thought were indications that the driver of the latter was intoxicated, and drove on until he came to a bridge. When he reached a point near its farther end he turned his automobile across it, got out, and drew his pistol. With that in his hand he went back to the other approaching automobile and halted it. Retaining the pistol in his hand, he proceeded, without the consent of the owner, to open the door of his automobile, searched it, and found whiskey in it. Asher at this time had no search warrant, nor had he the owner's consent to search the automobile."
>
> *Heaton v. Commonwealth*, 243 S. W. 918 (Kentucky)

is not authority against us. We quote from the opinion:

> "Only two witnesses were introduced for the Commonwealth and none for the defendant and the Commonwealth's evidence shows that about Christmas 1921 a deputy sheriff of Harlan County with two or three others were watching out for persons who might be trans-

> porting liquor; that they met appellant on the public highway and that that he had something tied upon in an apron, whereupon he was arrested and there was found wrapped up in the apron a quart of whiskey and another quart jar in his pocket; that the arresting party did not know what he had until after he was arrested and searched and none of them had a warrant for his arrest or a warrant authorizing a search of his person; and that he had not in the presence of the deputy sheriff or any of them violated any law * * * *The evidence in the case shows without contradiction that the officer and his party did not know what appellant had until they arrested and searched him and we take it from this that the package wrapped in the apron could not have been open and obvious to one within a reasonable distance*, and that one passing appellant on the highway could not have ascertained from observation what the package contained and likewise it is apparent from this evidence that they did not and could not have known what was in his pockets."

We take it that the Kentucky Court of Appeals would have decided differently had the officer spied not an apron but a boat load of gunny sacks showing clearly the outlines of bottles.

People v. Foreman, 188 N. W. 375 (Michigan), cited by counsel needs no comment except to quote the syllabus:

> "Under Constitution, Article II, Section 10, relative to unreasonable searches and seizures, an officer suspecting one of having intoxicating liquor in his grip cannot search the grip without a search warrant unless invited to do so."

Hughes v. State, 238 S. W. 588 (Tenn.), is an authority in our favor. The last syllabus states the holding of the court, and follows:

> "Where an officer had seen accused bringing to his automobile a keg having the appearance of a nail keg from a direction in which there was no store or other place where nails could be obtained, and knew that accused was reported to be engaged in the unlawful sale of liquor, the officer was justified in believing that a violation of the law against transportation of intoxicating liquors, which was a breach of the peace, was about to be committed and in arresting accused without warrant and searching him for evidence to be used against him, so that liquor seized by the officer at the time of making the arrest is admissible in evidence against the accused."

Finally, the arrest being valid, the search and seizure being incidental thereto were also lawful.

Weeks v. U. S., 232 U. S. 383, 58 L. E. 652.

II. THE INDICTMENT IS NOT DUPLICITOUS.

"Duplicity" is here misused by counsel. Duplicity

in an indictment consists in the joinder of two or more distinct offenses in one count.

Epstein v. U. S., 271 Fed. 282 (2nd C.C.A.)

The contention is that the several counts are not properly joinable in one indictment because (1) Count I charges a felony while the remainder of the counts are for misdemeanors, (2) the defendants in Count I are charged with conspiring together *and with other persons to the grand jurors unknown.*

Your Honors have decided the first point contrary to defendants in *Glass v. U. S.*, 222 Fed. 773. See also R. S., Sec. 1024, providing:

> "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

The fallacy of defendants' second contention in this regard is that the *other persons to the grand jurors unknown* are not joined as defendants in the first count. The allegation is merely that they were

co-conspirators and may be disregarded as surplussage.

> *Jones v. United States*, 179 Fed. 584 (9th C.C.A.)

The cases cited by defendants to sustain a contrary position are either not in point or in our favor. Of the latter class is *McElroy v. U. S.*, 164 U. S. 76, 17 Sup. Ct. Rep. 31; 41 L. E. 355, wherein a consolidation for trial of two indictments against several defendants for assault with intent to kill, with another indictment against only part of them for arson committed on the same day, and with another indictment against all of them for arson committed two weeks later, *when there was nothing to show a conspiracy or to connect the transactions together*, was held erroneous. In *Coco v. U. S.*, 289 Fed. 33 (D. C.), the syllabus reads as follows:

> "Under joint indictment, conviction of different defendants of distinct and separate offenses is improper."

Brinnie v. U. S., 200 Fed. 726 (17th C.C.A.), is certainly not authority against us. The syllabus there reads:

> "Where an indictment against two defendants charged in several counts several joint violations of the oleomargarine act [Act Aug. 2, 1886, c. 840, 24 Stat. 209 (U. S. Comp. St.

> 1901, p. 2228)], and the evidence, except as to two of the counts, showed only separate offenses, and but one joint verdict was rendered, a conviction could not be sustained, except as to the two counts with reference to which the evidence justified a finding of a joint offense."

U. S. v. McConnell, et al., 285 Fed. 164 (D. C.), is more authority for the Government than defendants.

III. DEFENDANTS WERE NOT DENIED TRIAL BY AN IMPARTIAL JURY

Defendants complain at the District Court's requirement that their counsel on his *voir dire* examination of the jurors addressed his general quesitons as to the qualifications of the jurors to the jury as a whole. This was merely a time saving device on the part of the court to avoid unnecessary repetition in the case of each juror of the general qualifying questions usually asked a prospective juror and certainly did not result in prejudice to the defendants. It is significant that defendants have not seen fit to incorporate into the transcript of the record in this cause the questions which the court so directed to be put to the jury as a whole, and it must be presumed on appeal that the questions were of such a nature and of so general a char-

acter as to properly be directed to the jurors as a whole at the sound discretion of the court.

Error is not assigned to the court's refusal to permit counsel on his examination of one of the jurors to ask the following questions (Tr. p. 119):

> "Q. If you were accepted on the jury, Mr. Priest, could the defendants rely upon you to vote for no verdict except what you thought was right irrespective of what the other jurymen did—
>
> The Court. The question is not fair. Need not answer.
>
> Q. —except as they might influence you by legitimate argument? The fact that seven or eight or even more of the other jurors would vote differently from what you thought was the right verdict would not influence you to vote that way?"

The court in refusing to permit such a question commented as follows (Tr. p. 119):

> "That is not a fair question. What we want to find out is whether the jury knows anything about this case, whether they are prejudiced, whether they have any preconceived notions about it; not what they would do under or upon a certain state of facts."

It is obvious that in this ruling the court was correct. The court would no doubt have granted an instruction to this effect at the termination of the case, but such a question had no place on *voir dire*

examination, the only purpose of which is to determine the fitness and qualifications of those about to serve as jurors. The same point was raised in the *State of Washington v. Duncan*, 24 Wash. Dec. 293, where in making up the jury the appellant questioned one of them as follows:

> "If you are sworn as a juror, will you, if the State proves possession, cause the defendant to prove that he did not have it for unlawful use?"

The court said:

> "The objection to this question was properly sustained. It was the duty of the court to instruct the jury in questions of law involving this case, and, of course, the duty of the jury to follow the court's instructions."

The case of *Allen v. United States*, 164 U. S. 492, 17 Sup. Ct. Rep. 154, 41 L. E. 528, relied on by counsel merely holds that a charge by the court that jurors should examine the questions involved with candor and with a proper regard and deference to the opinions of each other and decide the case if they could conscientiously do so, is not error, as hereinabove stated. Such an instruction might very properly be given by the court if requested but it certainly had no proper place in the form of a question propounded by counsel on *voir dire* examination.

IV. THE COURT WAS CORRECT IN REFUSING TO GO INTO THE LEGALITY OF THE ARREST AND SEIZURE IN THE MINUTES OF THE TRIAL.

The general rule, of course, is that courts in criminal cases will not pause in the midst thereof to determine how the possession of evidence tendered has been obtained. The exception to this rule is where it develops during the trial of the case that evidence introduced therein has been seized in violation of the defendant's constitutional rights. If it becomes probable during the trial of a cause that such an illegal seizure has taken place, then ordinary justice requires that the court pause and inquire more fully into the matter by which the evidence was seized.

Gouled v. U. S., 298 U. S. 313, 65 L. E. 647;
Amos v. U. S., 255 U. S. 314, 65 L. E. 655.

The instant case, however, is plainly not within this exception. The validity of the seizure was determined at the defendants' instance prior to the time of the trial and there is not a particle of testimony in the case tending to show that the liquor was unlawfully seized. On the contrary, the transcript of record is replete with testimony to the contrary.

V. THE CONSPIRACY COUNT.

The portions remaining of defendants' brief which we have not thus far discussed, deal with the sufficiency of the testimony to support the conspiracy count and the court's instructions in regard thereto.

The argument is first that the overt act alleges unlawful *importation* of intoxicating liquor, that the proof submitted to sustain the overt act amounted to transportation only and that the variance is fatal. This is an assumption unwarranted by the text of that portion of the count designated "Overt Acts." The word "transportation" is there used to describe the carrying of the liquor from British Columbia to Stanwood, Washington, and it is plain the *transportation* and *not the importation* of the liquors was relied on by the grand jurors as constituting the overt act.

As counsel suggests, it is elementary that an indictment should be drawn with such particularity as to advise defendants before the trial in plain and certain terms, the charges which they must be prepared to meet. The employment of any other method in the preparation of an indictment might leave the defendants pitifully prejudiced in the presentation

of their case and that is the reason of the rule. But, it is significant to note that no claim of prejudice is here made by reason of the so-called failure of proof; and no prejudice could have resulted by any stretch of the imagination, for defendants were, by the very terms of the indictment notified that the Government would rely on the unlawful transportation from British Columbia to Stanwood, and consequently were prepared to meet the Government's proof as to a part of that journey, viz., from the mouth of the Stillaguamish river to Stanwood. The variance between pleading and proof, if any there was, was not fatal because not prejudicial.

Defendants further fall into error in assuming that the conspiracy count contains an allegation of but one overt act. It is settled that any act, however small, performed pursuant to and to carry out, the object of a conspiracy, may be relied on as an overt act.

> *Criminal Code* (Act March 14, 1909, c. 321) Sec. 37; 35 Stat. 1096 (Comp. Stat. Sec. 10201)

Plaintiff might have, with propriety, pleaded as overt acts in this case, numberless steps or portions of the journey, which formed together as a whole constituted the unlawful transportation alleged

under the head "Overt Acts." That the pleader has seen fit to combine the numerous overt acts necessarily involved into an allegation of one unlawful transportation, does not alter the fact that fundamentally a series of overt acts are involved. It is settled law that if several overt acts are charged it is not necessary to prove them all.

12 *Corpus Juris* 627; *Jones v. United States*, 179 Fed. 584 (9th C.C.A.)

It is plaintiff's contention, therefore, that the allegation of unlawful transportation of intoxicating liquors from British Columbia to Stanwood, Washington, is in fact and in legal contemplation the allegation of a series of severable and separate overt acts each constituting a component part of the journey as a whole and that any part of said journey or unlawful transportation might be relied on by plaintiff to establish the overt act.

In *United States v. Newton* (D. C.), 52 Fed. 275, the court's oral instructions alone are reported. That was a criminal prosecution for conspiracy to defraud the United States, the overt act alleged being the mailing from Des Moines, in the Southern Division of Iowa, of a large quantity of old newspapers for the purpose of fraudulently increasing the weight of the mail over defendant's post route.

The court there instructed the jury not to take into consideration in support of this overt act certain re-wrapping and re-mailing of these old newspapers at Cainesville, Missouri, by a Mr. Oxford, an alleged co-conspirator. This instruction was correct. The overt act sought to be substituted for the one alleged was performed by a different conspirator in a different district. The act sought to be proved bore no relation to and was not a component part of the overt act alleged, and defendants must have necessarily been prejudiced had the Government been permitted to prove an overt act *not alleged.*

Rabens v. United States, 146 Fed. 978 (4th C.C.A.), is not in point. It holds merely that a conviction on an indictment charging conspiracy to rob a postoffice at Latta, South Carolina, is not supported by testimony that the accused participated in a *general conspiracy* to rob banks and everything that was robable. The law of the Rabens case, *supra,* will not be disputed, but it certainly has no application here, for it is not contended that there was a failure to prove the conspiracy as laid in the charging part of the indictment.

Windsor v. U. S., 286 Fed. 51 (6th C.C.A.)

In the case of *Einziger v. United States,* 276 Fed. 905 (3rd C.C.A.), there was a failure to prove the

charging part of the conspiracy count, viz., "conspiracy to sell" intoxicating liquors. That there is no analogy between that and the instant case is clear, because here the conspiracy was to "import," "*possess*", and "*transport*" intoxicating liquor, and the record is replete with testimony showing conspiracy to violate the National Prohibition Act by the two latter methods. That no importation was shown is obviously not material.

The cases of *Naftzger v. United States*, 200 Fed. 494 (8th C.C.A.); *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. Rep. 781, 30 L. E. 849, and siimlar cases cited on pages 67 to 74 of defendants' brief to the effect that unnecessary averments in an indictment must be proved, are not in point for the reason that in those cases the allegations, though unnecessary to a statement of the offense involved, were of such a nature as to have mislead the defendants, while in the instant case, as heretofore pointed out, no possible prejudice could have resulted to defendants in putting the initial point of transportation in British Columbia. As stated in *Harrison v. United States*, 200 Fed. 662 (6th C.C.A.):

> "Upon the question of variance between indictment and proofs, the controlling consideration should be whether the charge was fairly and fully enough stated to apprise defendant of

> what he must meet, and to protect him against another prosecution, and whether those particulars in which the proof may differ in form from the charge support the conclusion that respondent could have been misled to his injury (Foster v. U. S. [C.C.A. 6] 178 Fed. 165, 171, 101 C.C.A. 485; Bennett v. U. S. [C.C.A. 6] 194 Fed. 630, 632, 114 C. C. A. 402).

It must in this connection be borne in mind that an indictment under Criminal Code, Section 37, the conspiracy is the gist of the offense and hence the offenses which the defendants conspired to commit need not be stated with the particularity required in charging the offense itself, but only with such particularity as to identify it.

> *Roulovitch v. United States*, 286 Fed. 315 (3rd C.C.A.)

It follows that in pleading an overt act which is no part of the charging portion of the count and cannot be resorted to to aid defects therein (Roulovitch v. United States, *supra*), the Government should not be held to that particularity of pleading necessary when charging a substantive offense, and the only test upon the question of variance between the overt acts alleged and the proof should be *whether the overt acts were fully and fairly enough stated to apprise the defendant of all he must meet.* Applying that test here we find that the defendants

were fully and fairly advised that the Government would rely on the unlawful transportation of the liquor described in the indictment in the defendants' gas boat "Dragon" to a place near Stanwood, Washington, on October 4, 1922, and hence must have come fully prepared to meet the testimony offered by the Government in that regard.

On this point in conclusion, defendants' statement on page 62 of its brief of the question here involved is incorrect in that it assumes that the overt act proved was one not laid in the indictment.

Contention is further made that the court's instructions permitted the jury to find defendants guilty on overt acts not laid in the indictment, and they cite in support thereof the following excerpt from the court's instructions. (Tr. pp. 164, 165; Defendants' Brief, p. 76):

> "And then the next is to commit the offense, —the conspiracy to commit in this case the violation of the national prohibition act. And then before that is an offense something must be done by one of the parties to carry forward the conspiracy. It is immaterial what that act is. It might be sailing a boat down stream, or it might be carrying a cargo or the prohibited commodity in a boat. It might be any minor thing. In this case the overt acts charged in the indictment are set forth in that

> count; and it is not necessary that the government establish all of the overt acts charged. It is sufficient if they have proved one act that would carry forward the conspiracy."

These instructions are a long way from telling the jury that the overt acts may be established by facts not pleaded under that head in the indictment. The court was merely illustrating to the jury the character of overt acts in general when it said:

> "It is immaterial what that act is. It might be sailing a boat down stream or it might be carrying a cargo or the prohibited commodity in a boat. It might be any minor thing."

The court was not charging that those particular acts might be found to be overt acts in *this* case. This is made plain by the court's next sentence:

> "In *this* case the overt acts charged in the indictment are set forth in that count; and it is not necessary that the Government establish *all of the overt acts charged.*

Then follows the sentence to which defendants apparently take exception:

> "It is sufficient if they have proved one act that would carry forward the conspiracy."

The reference to "one act," construing not this one sentence, but the entire instruction complained of as a whole, is plainly to one of the *overt acts*

charged, and we are at a loss to see how a body of reasonably intelligent men could have been led to put a contrary construction on these words.

As a matter of fact, it would have been an impossibility for the jury to have found, from the proof submitted, evidence of any overt act other than the unlawful transportation to Stanwood alleged in the indictment, the Government's entire case being rested on testimony to that effect alone. Consequently, assuming that the court's instructions would have permitted the jury to consider an overt act not laid in the indictment, the instructions were not prejudicial because the only overt acts the testimony developed were pleaded in the indictment.

It is submitted that the record as a whole shows no reversible error, and that the judgment of the court below should stand affirmed.

Respectfully submitted,

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